No. 89-965

Supreme Court, U.S.
FILED
Dec 8 1989
JOSEPH F. SPANIOL
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ROBERT V. RAFTER,

Appellant,

- against -

LIBERTY LINES TRANSIT, INC. and COUNTY OF WESTCHESTER,

Appellees,

and INSURANCE COMPANY OF NORTH AMERICA,

Defendant.

On Appeal From the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

ROBERT V. RAFTER,
Attorney for appellant
Post Office Address
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(914) 967-2975

THE QUESTIONS PRESENTED

(1) Can the County and Liberty avoid their transit obligations and liability in the matter of knowledge of wrongdoing, knowledge of the danger of the wrongdoing, and knowledge that the wrongdoing caused the injuries, and can the transit company, Liberty, avoid no-fault coverage in direct contradiction of the N.Y. insurance regulation, as set forth in detail at page 4 of the mandamus petition submitted in conjunction with this jurisdictional statement and forming a part of the record before the court of appeals and of that before the appellate division, second department.

(2) Can this avoidance be definitively brought about by the Supreme Court of Westchester County (Hon. Harold Wood) through the unlawful device (A4) of treating the return date of the motion to dismiss as February 23, 1988, rather than the actual noticed date of March 23, 1988 (Exhibit C of petition for mandamus) and thus stating that there was no opposition to the motion to dismiss (A4), when in fact plaintiff

(appellant) had duly filed and served an affidavit and memorandum of law in opposition (Exhibit D of the petition for mandamus).

(3) Does this unlawful contrivance constitute denial of due process and equal protection rights provided for by the fourteenth amendment.

(4) Can the Appellate Division, Second Department, and the Court of Appeals blind-sight all of the above and ignore the denial of due process and equal protection by further dismissing the appeal on the tenuous grounds of no grievance, no final order, and no substantial constitutional question (A3, A1 and A6-7).

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TABLE OF AUTHORITIES

Cases cited:

Dunlap v. Mercer, 156 Fed. 545, at 555, ... 5

Connolly v. Union Sewer Pipe Co., 184 US 540, at 559 5

Kendall v. Ewert, 259 US 139, at 143; 66 Led 862, October Term 1921, ... 3

Constitution and Rules cited:

The Fourteenth Amendment to the Constitution of the United States ..... ii, 2, 3-5

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ROBERT V. RAFTER,
Appellant,

- against -

LIBERTY LINES TRANSIT, INC. and COUNTY OF WESTCHESTER,
Appellees,

and INSURANCE COMPANY OF NORTH AMERICA,
Defendant.

On Appeal From the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

Appellant, Robert V. Rafter, appeals from the September 12, 1989, Order of the Court of Appeals of the State of New York dismissing sua sponte appellant's appeal from the order of the Appellate Division for the Second Judicial Department,

OPINIONS BELOW

The decision of the Court of Appeals dismisses without more, specifying no final order and no substantial constitutional question (A1).

The opinion of the Appellate Division is set forth in its order of February 23, 1989 (A2).

The opinion of the Supreme Court for the County of Westchester, the Honorable HAROLD WOOD, is set forth in its order of March 31, 1988 (A5).

JURISDICTION

The judgment sought to be reviewed was entered September 12, 1989 (A6). A Notice of Appeal (A8) was timely filed with the Court of Appeals of the State of New York on November 30, 1989.

The jurisdiction of this Court is invoked under 28 USC 1257(2).

THE CONSTITUTIONAL PROVISIONS INVOLVED AND THE STATE LAW UNDER REVIEW

This case involves the Due Process and Equal Protection Clause of the Fourteenth Amendment.

The State Law under review is a Rule of the Appellate Division, Second Department, providing for dismissal of appeals where the record, briefs and note of issue are not filed except for good cause shown:

> Part 670 of Title 22 of the Official Compilation of Rules and Regulations of the State of New York:
> paragraph 670.20 (f) Notwithstanding any of the provisions of this section or any of the other rules governing procedure in this court, a civil appeal shall be deemed abandoned unless the record, briefs and note of issue are served and filed within nine months after the date of the notice of appeal ..... unless for good cause shown an order shall have been entered on motion therefor extending such time .....

Paragraph (f) is set forth in its entirety at (A 9)

CONCISE STATEMENT OF THE CASE

I
Jurisdiction

The Court of Appeals dismissed the appeal; so under the terms of Kendal v. Ewert this is a final order which brings up the entire record for review. To dismiss in the Appellate Division despite section (f) timely good cause shown is a denial of due process. So also is

the entire case imbued with denial of due process on a cumulative basis, including the jury trial against INSURANCE COMPANY OF NORTH AMERICA, as graphically appears from the Mandamus Petition before the Appellate Division, filed as an exhibit to this JURISDICTIONAL STATEMENT and forming a part of the papers before the Court of Appeals.

The validity of paragraph (f) was challenged before the Court of Appeals:

> At page 2 - The Appellate Division Order denied appellant's motion to extend time to file the papers on appeal and dismissed the appeal. Rule 670.20(f) (Supreme Cpurt Rules, Article 2 , Second Judicial Department , Part 670) provides for an extension of time for good cause shown, and that is the only requirement under the rule. The Appellate Division in denying the motion and dismissing the appeal fixes an additional requirement, an additional penalty, as it were, not provided in the statute, and not intended by the lawmaking power. It, therefore, was error to so hold. It is respectfully submitted that, if Rule 670.20(f) is to be interpreted as requiring something in addition to good cause shown, it should say so. In its present state

it is unconstitutionally vague and misleading, and it results that plaintiff has been denied fourteenth amendment due process and equal protection of the laws.

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* Dunlap v. Mercer, 156 Fed. 545, at 555, it is not the province of the court to affix an additional penalty not directed by the lawmaking power.
Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 46 L.ed. 679, 22 Sup. Ct. Rep. 431, at 559-560, the laws operate upon all alike and due process and equal protection do not subject the individual to an arbitrary exercise of powers of government.

Thus, there is drawn in question the validity of a state statute on the ground of its being repugnant to the Constitution, and the decision of the highest atate court is in favor of its validity (A1).

II
Stage in Proceeding s Federal Questions Raised

Due process and equal protection rights with respect to paragraph 670.20(f) of the Appellate Division Rules was first asserted in appellant's jurisdictional statement before the Court of Appeals, at page 2 thereof, as set forth above and at page page 4 of this statement.

CONCISE STATEMENT OF THE CASE

This is a jury case. The complaint sets forth two causes of action: the first for personal injury against the County and Liberty, and the second for compliance with the New York no-fault insurance law against Liberty and Insurance Company of North America.

The Supreme Court of the State of New York for the County of Westchester (Hon. Harold Wood) dismissed both causes of action against the County and Liberty (A4 and A5) stating that their was no opposition, contrary to the facts as set forth above at page i.

The no-fault cause of action against Insurance Company of North America was tried before a jury July 11-13, 1988, and judgment for the plaintiff was entered December 12, 1988. So much of that judgment as dismissed plaintiff's claim for punitive damages is on appeal with the papers filed August 15, 1989, and to be heard by the Second Department sometime in June of 1990.

Appellant appealed from the order of Judge Wood (A4-5) and moved before the Appellate Division for an extension of time to file the record which had been required for the trial of Insurance Company of North America. This motion is set forth at A10 and includes "good cause shown" in the affidavit in support of the motion.

The Appellate Division denied the motion and dismissed the appeal because, as it says (A2-3), plaintiff did not oppose the motion to dismiss.

Plaintiff appealed this denial and dismissal, and the Court of Appeals dismissed the appeal stating that there was no final order and no substantial constitutional question (A1 and A6-7).

REASONS FOR GRANTING THE APPEAL

Under the American system the state is created for the benefit of the individual.

The antithesis of this system is one in which the rights of the individual are ignored for the benefit of the state, as has happened here.

This appeal is appellant's only means of surmounting masquerading fascism.

CONCLUSION

For the above reasons, plenary consid—eration is in order.

Respectfully submitted,

ROBERT V. RAFTER,
Attorney for appellant

Opinion of the Court of Appeals

STATE OF NEW YORK,
COURT OF APPEALS

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2 Mo. No 986 SSD 62
Robert V. Hafter,
Appellant,
v.
Liberty Lines Transit, Inc.,
et al. ,
Respondents,
et al.,
Defendant.

DECISION COURT OF APPEALS SEP 12,1989

Appeal from that portion of the Appellate Division order which denied plaintiff time to enlarge his appeal dismissed without costs, by the Court sua sponte, upon the ground that that portion of the order does not finally determine the action within the meaning of the Constitution; appeal otherwise dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Order of Appellate Division

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

2181V
B/nl

WILLIAM C. THOMPSON, J.P.
RICHARD A. BROWN
ISAAC RUBIN
GERALDINE T. EIBER, JJ.

Motion No. 886

DECISION & ORDER ON MOTION

Robert V. Rafter, appellant, v. Liberty Lines Transit, Inc., et al., respondents; et al., defendant

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Motion by appellant to enlarge time to perfect the appeal from an order of the Supreme Court, Westchester County, entered March 31, 1988.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied; and it is further,

ORDERED that upon the court's own motion, the appeal is dismissed without costs.

Order of the Appellate Division

The plaintiff was not aggrieved by the order, as it recites that the plaintiff did not oppose the motion to dismiss the complaint as to the defendants-respondents.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

February 23, 1989

Decision and Order of the Supreme Court for the County of Westchester, Hon. HAROLD L. WOOD, JSC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

ROBERT V. RAFTER,

Plaintiff,

- against -

LIBERTY LINES TRANSIT, INC., COUNTY OF WESTCHESTER and INSURANCE COMPANY OF NORTH AMERICA,

Defendants.

DECISION AND ORDER

INDEX NO. 08763/87

MOTION DATE : 2/23/88

WOOD, J.

The motion of the defendants, Liberty Lines Transit, Inc. and County of Westchester, for summary judgment dismissing plaintiff's action is not opposed by plaintiff and is accordingly, granted as to the moving defendants only, without costs.

Decision and Order of the Supreme Court for the County of Westchester, Hon. HAROLD WOOD, JSC

This decision of the Court shall constitute the order of the Court.

ENTER :

Dated: March 30, 1988
White Plains, New York

s/ _____
HAROLD L. WOOD
J.S.C.

FILED AND ENTERED
3/31/88
WESTCHESTER COUNTY CLERK

Order of Court of Appeals

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court of Appeals in the City of Albany on the 12th day of September, 1989

PRESENT, Hon. SOL WACHTLER, Chief Judge, presiding.

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2 Mo. No. 986 SSD 62

Robert V. Rafter,

Appellant,

v.

Liberty Lines Transit, Inc., et al.,

Respondents,

et al.,

Defendant.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal from that portion of the Appellate Division order which denied plaintiff time to enlarge his appeal be and the same is dismissed without costs, by the Court sua sponte, upon the ground that that portion of the order does not finally determine the action

within the meaning of the Constitution; and it is

ORDERED, that the appeal otherwise be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

s/_____
Donald M. Sheraw
Clerk of the Court

Index No. 2 Mo. No. 986 SSD 62

IN THE STATE OF NEW YORK COURT OF APPEALS

ROBERT V. RAFTER,

Appellant,

- against -

LIBERTY LINES TRANSIT, INC. and COUNTY OF WESTCHESTER,

Appellees,

and INSURANCE COMPANY OF NORTH AMERICA,

Defendant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that ROBERT V. RAFTER, the appellant above named, hereby appeals to the Supreme Court of the United States from the September 12, 1989, order of the New York Court of Appeals dismissing the appeal in the above matter. This appeal is taken pursuant to 28 USC 1257(2).

Dated: November 9, 1989.

s/ ROBERT V. RAFTER
Attorney for appellant
131 Purchase Street
Rye, New York 10580

Filed with N.Y. Ct. Appeals Nov. 30, 1989.

Fourteenth Amendment and Rule 670(f)

Article The Fourteenth

Sect. 1. .....

nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 670.20(f) Appellate Division 2nd

(f) Notwithstanding any of the provisions of this section or any of the other rules governing procedure in this court, a civil appeal shall be deemed abandoned unless the record, briefs and note of issue are served and filed within nine months after the date of the notice of appeal or order of transfer in article 78 proceedings, unless, for good cause shown, an order shall have been entered on motion therefor extending such time. The clerk is authorized to enter an order of dismissal of all appeals deemed abandoned. This rule shall apply to all notices of appeal served and filed on or after January 1, 1980.

Notice of Motion to Extend Time to File before Appellate Division

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

ROBERT V. RAFTER,

Appellant,

- against -

LIBERTY LINES TRANSIT, INC., COUNTY OF WESTCHESTER,

Respondents,

and INSURANCE COMPANY OF NORTH AMERICA,

Defendant.

NOTICE OF MOTION

Index No. 08763- 87

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of the appellant, sworn to January 17th, 1989, the undersigned will move this Court on the 27th day of January, 1989, at a motion term thereof at the courthouse at 45 Monroe Place, Brooklyn, New York, at 9:30 O'clock in the forenoon of that day or as soon thereafter as

counsel can be heard for an order pursuant to Rule 670(f) of Title 22 extending the nine month rule for filing of record, briefs and note of issue, and for such other and further relief as to the Court shall seem just and proper.

DATED: January 17, 1989

ROBERT V. RAFTER
Attorney for appellant
131 Purchase Street
Rye, New York 10580
(914) 967-2975

TO: VINCENT P. NESCI
Attorney for respondents
475 Saw Mill River Road
Yonkers, New York 10702
(914) 969-6900

Affidavit in Support of Motion to Extend Time before Appellate Division

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SEOND DEPARTMENT

ROBERT V. RAFTER,

Appellant,

- against -

LIBERTY LINES TRANSIT, INC., COUNTY OF WESTCHESTER,

Respondents,

and INSURANCE COMPANY OF NORTH AMERICA,

Defendant.

AFFIDAVIT

INDEX NO. 08763-87

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

ROBERT V. RAFTER, being duly sworn, deposes and says:

He is an attorney at law duly admitted to practice before the Supreme Court of the State of New York and the United States District Court for the Southern District of New York.

He is the appellant above-named and makes this affidavit in support of the

instant motion for an order pursuant to Rule 670 of Title 22 extending the time within which to file the record, briefs and note of issue .

The notice of appeal is dated May 3, 1988, and the nine month period would expire February 3, 1989. This is an appeal from an order dismissing the action as to LIBERTY and the COUNTY. The balance of the action was then tried before a jury and the judgment for the plaintiff, ROBERT V. RAFTER, and against the defendant, INSURANCE COMPANY OF NORTH AMERICA, was entered on December 12, 1988. Appellant will appeal so much of this judgment after trial as denies plaintiff the right to prove bad faith against the insurance company in the administration of the no-fault law. Annex- to that notice of appeal will be a pre- argument statement (designated as "Form C")

with a copy of the May 3, 1988, Notice of Appeal and Pre-Argument Statement attached indicating that there is an additional appeal pending in the same action.

No earlier filing under Rule 670 could be made because of the pendency of the trial against the insurance company and the delay encountered in settling the judgment, as appears from the mandamus proceeding of November 10, 1988, before this Court, INDEX 8155-88. The record was required for the purposes of the trial.

Appellant intends to file for the June Term with appellant's papers due March 16, 1989. Accordingly, appellant respectfully requests that the nine-month rule be extended in the above-entitled appeal against LIBERTY and the COUNTY so as to permit review of the order of dismissal coincident with review of the judgment after trial.

Affidavit in Support of Motion to Extend Time before the Appellate Division

WHEREFORE, appellant respectfully requests that the motion be granted and the nine-month rule extended to permit a March 16, 1989, filing.

s/_____
ROBERT V. HAFTER

Suscribed and sworn to before me
this 17th day of January, 1989.

Deirdre Dincesen
Notary Public